

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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JOEL COUVERTIER,

Plaintiff,

v.

Civil Action No.  
1:16-CV-1024 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF:

OFFICE OF PETER M. MARGOLIUS  
7 Howard St.  
Catskill, NY 12414

PETER M. MARGOLIUS, ESQ.

FOR DEFENDANT:

HON. RICHARD S. HARTUNIAN  
United States Attorney for the  
Northern District of New York  
P.O. Box 7198  
100 S. Clinton Street  
Syracuse, NY 13261-7198

CATHERINE L. ZURGRUGG, ESQ.  
Special Assistant U.S. Attorney

DAVID E. PEEBLES  
CHIEF U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Acting Commissioner, pursuant to 42 U.S.C. §§ 405(g), and 1383(c)(3) are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on April 19, 2017, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Acting Commissioner's determination is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Acting Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

3) The matter is hereby REMANDED to the Acting Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Acting Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: April 28, 2017  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
JOEL COUVERTIER,

vs.

16-CV-1024

COMMISSIONER OF SOCIAL SECURITY.  
-----x

Transcript of *DECISION ON THE RECORD* held on  
April 19, 2017, at the James Hanley U.S. Courthouse,  
100 South Clinton Street, Syracuse, New York,  
the HONORABLE DAVID E. PEEBLES, Presiding.

A P P E A R A N C E S

For Plaintiff:  
(Via Telephone)

OFFICE OF PETER M. MARGOLIUS  
7 Howard Street  
Catskill, New York 12414  
BY: PETER M. MARGOLIUS, ESQ.  
JANICE CAMMARATO

For Defendant:  
(Via Telephone)

SOCIAL SECURITY ADMINISTRATION  
Office of Regional General Counsel  
Region II  
26 Federal Plaza - Room 3904  
New York, New York 10278  
BY: CATHARINE L. ZURBRUGG, ESQ.

1 (In chambers, via telephone:)

2 THE COURT: I have before me a request for judicial  
3 review of an adverse determination by the commissioner, or  
4 acting commissioner of Social Security, pursuant to 42,  
5 United States Code, Section 405(g) and 1383(c)(3).

6 The background is as follows. The plaintiff was  
7 born in October of 1981. He is currently 35 years old. He  
8 was 30 years old at the alleged onset date of his disability  
9 and 32 years old at the time of the hearing in this matter.

10 The plaintiff is divorced; has three children who  
11 do not live with him. They are ages 6, 9 and 12 -- or were  
12 at the time of the hearing in this matter. He sees the  
13 youngest and the oldest on occasion.

14 He has a ninth grade education. The record is  
15 somewhat equivocal as to whether or not he attended special  
16 education classes. Page 434, he indicated to a consultative  
17 examiner, he did. The administrative law judge found that he  
18 did not. However, he cited two of the disability reports. I  
19 reviewed them carefully and I can't find anywhere that it  
20 indicates that he did not. But it's not relevant. He did  
21 not achieve a GED but he testified that he can read and  
22 write.

23 He lives with his ex-inlaws. He last worked in  
24 2013. His past work includes an assembly line position and  
25 packing. And he worked in facilities that manufactured

1 filters and, later, bottles.

2 The plaintiff was incarcerated on a weapons charge.  
3 Again, the testimony is equivocal. He told Dr. Berger he was  
4 incarcerated for two years at Page 420. He testified he was  
5 incarcerated 2008 to 2011. That's at Page 42. However,  
6 there are records from the Department of Corrections and  
7 Community Supervision that suggest that he was, actually,  
8 incarcerated from 2002 to 2011.

9 The plaintiff was involved in a motor vehicle  
10 accident in 2001. He suffered back pain but it subsided but  
11 recurred approximately two years later and has been chronic  
12 ever since.

13 He has treated with Dr. Anna-Maria Assevero, who is  
14 his primary doctor. She has variously diagnosed him as  
15 suffering from lumbago, an annular tear and lumbar  
16 radiculopathy. He has received pain management, including  
17 injections Dr. Ronny Kafiluddi. He has, also, seen an  
18 orthopedic specialist, Dr. Ernso Eromo.

19 To address his condition, he has been prescribed  
20 tramadol, Flexeril, Naproxen, Percocet and Oxycodone and, in  
21 addition, uses a TENS unit.

22 He has had two MRIs of his lumbar back: One in  
23 June of 2012 that revealed mild degenerative disk disease at  
24 L4-L5, L5-S1 with some bulges and on February 6th, 2014,  
25 which demonstrated increasing degeneration, including at

1 L5-S1 with herniation and stable degeneration at L4-L5.

2 Mentally, the plaintiff was diagnosed by  
3 Dr. Hartman, a consultative examiner, as being in the  
4 borderline range of intelligence. That's at 436. He  
5 underwent brief mental health treatment at the Columbia  
6 County Mental Health Center in 2013 where he saw Dr. Shelley  
7 Sellinger. He was diagnosed as suffering from dysthymic  
8 disorder and a global assessment of functioning, or GAF,  
9 score of 65 was registered. He never returned, however, and  
10 was discharged.

11 His daily activities include cleaning, laundry,  
12 music -- listening to music, shopping. He can dress and  
13 groom himself. He cooks, watches television, plays video  
14 games and reads.

15 Plaintiff procedurally applied for benefits,  
16 Supplemental Security Income benefits on August 29, 2012,  
17 alleging an onset date of July 15, 2012.

18 A hearing was conducted by Administrative Law Judge  
19 Carl E. Stephan on December 12th, 2013. ALJ Stephan rendered  
20 a decision on September 12, 2014, which was unfavorable to  
21 the plaintiff. The decision became a final determination of  
22 the agency on June 15, 2016, when the Social Security  
23 Administration Appeals Council denied plaintiff's request for  
24 review.

25 In his decision, ALJ Stephan applied the familiar

1 5-step sequential test for determining disability.

2 He concluded at Step 1, plaintiff had not engaged  
3 in substantial gainful activity since August 29, 2012, the  
4 date of his SSI application. Although, he did note  
5 plaintiff's testimony that he worked for three to four months  
6 in 2013 as a factory worker.

7 At Step 2, the ALJ concluded that plaintiff suffers  
8 from three severe impairments: Back disorder, mood  
9 disorders, and learning disorder.

10 At Step 3, he concluded that none of those, either  
11 collectively or singly, met or equaled any of the listed  
12 presumptive disabling conditions set forth in the  
13 Commissioner's regulations.

14 After surveying the medical evidence, the  
15 administrative law judge concluded that plaintiff retains the  
16 residual functional capacity, or RFC, to perform light work,  
17 except that he can lift and carry 20 pounds occasionally and  
18 10 pounds frequently; sit for 8 hours; stand for 8 hours; and  
19 walk for 4 hours out of an 8-hour workday; can occasionally  
20 bend, stoop, climb stairs and ramps, twist and turn; can  
21 perform simple work; can make simple work-related decisions;  
22 can frequently interact with others; and he can tolerate  
23 changes in the work setting.

24 The ALJ concluded, based on that RFC determination,  
25 that plaintiff has no past relevant work and, so, skipped



1 Step 4 and, essentially, went to Step 5 where the  
2 Medical-Vocational Guidelines, or the grids, were applied and  
3 a finding of not disabled was dictated under Rule 202.17, the  
4 ALJ noting that the additional limitations of the RFC had  
5 little or no effect on the unskilled work and, therefore, the  
6 job base on which the grids were predicated.

7 As you know, my task is limited. My scope of  
8 review is deferential. I must determine whether correct,  
9 legal principles were applied and the determination is  
10 supported by substantial evidence.

11 The two pivotal points in this case are whether the  
12 administrative law judge properly considered, in his RFC  
13 finding, the consultative exams of Dr. Joseph Prezio from  
14 January 8, 2014, and Dr. Brett Hartman on July 14, 2014, and  
15 whether he properly explained the reasons for rejecting any  
16 additional limitations set forth in those consultative  
17 reports.

18 The problem I have is this. Dr. Prezio opined  
19 that, in addition to significant lifting restrictions, there  
20 were restrictions in the ability of the plaintiff to operate  
21 foot controls on the right foot. He was limited to  
22 occasional -- meaning up to one-third -- and there was an  
23 indication as to why the paralumbar muscle spasms on the  
24 right side.

25 Posturally, he was limited occasionally to climbing

1 stairs and ramps, climbing ladders or scaffolds, balance,  
2 stoop, kneel, crouch, crawl and, also, occasionally to  
3 unprotected heights. And the ALJ specifically noted those  
4 limitations at the bottom of Page 19 of his decision when he  
5 indicated the weight that he was according Dr. Prezio's  
6 determination, he gave little weight to the lifting component  
7 on Page 20.

8           However, he says, the rest of his opinion is given  
9 significant weight, as his findings are consistent with the  
10 overall medical evidence of record and supports the residual  
11 functional capacity described above. And the RFC, of course,  
12 does not include any of those limitations concerning foot  
13 controls, the postural, and the unprotected heights.

14           So, I do not find that the determination is  
15 supported by substantial evidence in connection with the  
16 physical component of the RFC.

17           And, unlike the case which I cited earlier and was  
18 cited by the commissioner, that is *Mongeur versus Heckler*  
19 reported at 722 F.2d 1033, I'm not able to glean from his  
20 decision, other than in a post hoc way, why those additional  
21 limitations were rejected.

22           And I agree with plaintiff's counsel, also, that  
23 the same holds true with Dr. Hartman, who opined that  
24 plaintiff has moderate difficulty relating adequately with  
25 others and moderate difficulty dealing appropriately with the

1 normal stressors of life. That's at Page 437. Once again,  
2 in speaking to Dr. Hartman's consultative exam, the  
3 administrative law judge, he indicated that the opinion was  
4 given significant weight and doesn't indicate why he did not  
5 include, in his RFC determination, a more -- a limitation in  
6 dealing with others that is more in line with what  
7 Dr. Hartman opined, which was moderate, which is more than he  
8 can frequently, as the RFC concludes.

9 So, I do not find that the commissioner  
10 determination is supported by substantial evidence. I think  
11 these matters need to be clarified. I do not find persuasive  
12 evidence of disability.

13 So, I will grant judgment on the pleadings to the  
14 plaintiff. Vacate the determination without a directed  
15 finding of disability and remand the matter to the  
16 commissioner for further consideration.

17 Thank you both for excellent presentations. I hope  
18 you have a good afternoon.

19 MS. CAMMARATO: Thank you, your Honor.

20 MS. ZURBRUGG: Thank you, your Honor.

21 MR. MARGOLIUS: Thank you, your Honor.

22 (Proceedings adjourned, 2:32 p.m.)  
23  
24  
25

## C E R T I F I C A T I O N

I, DIANE S. MARTENS, Registered Professional Reporter, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, that the foregoing is a true and correct copy of same and the whole thereof.

A handwritten signature in black ink, reading "Diane S. Martens", is written over a horizontal line.

DIANE S. MARTENS, FCRR